No. 93-180

In The

Supreme Court of the United States

October Term, 1993

BOCA GRANDE CLUB, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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REPLY TO RESPONDENT'S STATEMENT OF ISSUE AND STATEMENT OF CASE

In stating the issue presented for review Florida Power asks whether it, as a defendant who paid more than its proportional share of the liability, may seek contribution from Boca Grande Club, who paid less than its share of the loss. It has never been established in this case that Florida Power has been found liable for more than its share or paid more than its share of the total loss. Nor has it ever been established that Boca Grande Club caused or contributed to the loss or paid less than its proportionate share of the loss. In footnotes in the body of its brief Florida Power acknowledges that these fact issues have

not been resolved. (Resp. Br. 13 n.8; 22 n.14). Nevertheless, Florida Power bases its argument against a settlement bar rule upon the erroneous factual assumptions that it was found liable for, and paid more than, its proportional share of the total loss and that Boca Grande Club is primarily responsible for the collision and has paid less than its share. Boca Grande Club will rebut this argument in more detail in the argument portion of this reply brief.

In referring to the power line with which the sailboat collided, Florida Power says that "Boca Grande knew [it] to be dangerous." (Resp. Br. 1). All reasonable persons know that power lines are dangerous. However, that is not the thought Florida Power intends to convey. Rather, the inference is that Boca Grande Club knew that the power line in question was dangerous for some particular reason, as, for example, because it was too close to the water to allow the sailboat that it rented to Robert Polackwich to pass beneath it. This contention is not true. Boca Grande Club did not know that the Florida Power electric line was below its permitted height and for that reason posed a specific danger to the sailboat. (R3-99, Exhibit Folder 2, Ferguson Depo. 41-42). Had the power line been constructed in conformity with the United States Army Corps of Engineers permit issued to Florida Power the collision would never have occurred.[1]

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[1] The mast of the sailboat collided with the power line at a point 26' 7" above the surface of the water. The point of impact on the mast was 11" below its top. (R3-99, Exhibit Folder 2, Exhibit 4, Sheets 5 and 57). There should have been 35' of clearance between the power line and the water according to National Oceanic and Atmospheric Administration Nautical Chart No. 11425. (R3-99, Exhibit Folder 2, Exhibit No. 2). At the point where the power line contacted the mast the line should have been at least 30' above the water to be in compliance with the permit issued by the United States Army Corps of Engineers which authorized erection of the obstruction to navigation. (R3-99, Exhibit Folder 2, Exhibit No. 3 at sheet 5; Adams Depo at 61-65).

Florida Power asserts that Boca Grande Club took the position before the district court that its settlement with the decedent's estates "did not have to be in 'good faith'." (Resp. Br. 2). That statement is not true. Boca Grande Club took the position that the settlement was made in "good faith" and that "[t]he settlement was made in the open, without any collusive purpose or ulterior motive." (JA 56). A copy of the agreement was made part of the court record. (JA 63). Boca Grande Club pointed out to the district court that Florida Power had not revealed in what manner or particular the settlement lacked good faith (JA 55-56) and argued that existing law, *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed.2d 604 (1988), did not require a good faith hearing before the settlement operated as a bar to the pending contribution claim of Florida Power. (JA 56, 58-60).

In discussing the district court's order granting summary judgment Florida Power asserts that the district judge "specifically rejected" any requirement that Boca Grande Club's settlement with the decedents' estates need be "non-collusive and in good faith." (Resp. Br. 3). This statement is not true. In fact it is blatant innuendo. The order granting summary judgment did not say or suggest that the settlement was collusive or in bad faith.

The order merely refused to tack on the requirement of a good faith hearing to the rule laid down in *Self*. (JA 88-90).

THE PARTIES, AND THE AMICI WHO ARE INVOLVED IN MARITIME CASES, ALL RECOGNIZE THAT THIS CONTROVERSY CAN BEST BE RESOLVED BY ADOPTION AND IMPLEMENTATION OF THE *LEGER* RULE

Boca Grande Club intended that the settlement it made would remove it from this lawsuit and terminate pending contribution claims. That is the relief Boca Grande Club seeks. Florida Power fears that it may be required to pay more than its share of the total loss and wants to preserve the opportunity to return to the district court at some future date to attempt to establish that it has a viable claim for contribution against Boca Grande Club.

Petitioner and Respondent recognize that the best and preferable solution to this controversy is not further litigation in the limitation action presently pending in district court. This controversy can be resolved and further litigation avoided by adopting the *pro rata* rule established in *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), and implementing that rule in this maritime case.

The United States and the Maritime Law Association of the United States have each concluded that in maritime cases involving a settlement between a plaintiff and one of several defendants, application of the *pro rata* or *Leger* rule is the best means of determining pending or potential contribution claims and for allocating the settlement

against the overall liability. The expertise of these two *amici* in maritime law lends especial credence to the argument for adoption of *Leger*. Indeed, Boca Grande Club submits that the arguments in favor of implementation of the *pro rata* rule in this case and in future maritime actions are both compelling and convincing.

IF THE COURT DOES NOT ADOPT *LEGER* THEN A SETTLEMENT BAR RULE SHOULD BE ESTABLISHED

The argument advanced by Respondent and the *amici* that a settlement bar rule should not be adopted and applied in this case because such a rule is unfair is not supported by the facts of this lawsuit and is otherwise unpersuasive. This is not the first time that Florida Power has been taken to court to pay for damage caused by obstructions it erected in the navigable waters. *Richey v. Florida Power & Light Company*, 468 So.2d 306 (2 DCA 1985) (Power boat struck unlighted concrete stanchion built by Florida Power). Regrettably, it probably will not be the last time, and, for that reason, Florida Power obviously would like to keep open its options respecting claims for contribution.

The argument against a settlement bar rule is based upon the assumption that the settling party, in this case, Boca Grande Club, is usually the party that is primarily and predominantly responsible for the loss. The argument further assumes that the parties left to go to trial, in this case Florida Power, are virtually free of fault for the casualty; that because of their deep pockets, they cannot settle with the plaintiff and are thus forced to trial where, because of joint and several liability, they are invariably

found liable for the entire loss less only what was paid in settlement by the true wrongdoer. To accept this argument it is necessary to believe that a plaintiff always opts for a quick and cheap settlement with the defendant that is primarily responsible for the greater part of the loss in order to try the case against the party whose only fault is that it has deep pockets and the bad luck to have some connection with the casualty. Merely to state the proposition demonstrates its absurdity. Nevertheless, Florida Power seriously advocates the argument – in its brief it states "it is inherently unfair that the liability of a party such as FP&L should derive not from its own responsibility for the accident but rather from a private contractual arrangement made by others in which FP&L was not permitted to participate." (Resp. Br. 16). This preposterous statement is followed by one equally absurd when Florida Power states that "it is manifestly unjust to saddle FP&L with 62 1/2% of the damages when it is in reality less at fault than the 'innocent victims.' " (Resp. Br. 22 n.14). Is Florida Power truly innocent of wrongdoing that caused the collision?[2] Or, is this argument advanced to

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[2] Before any settlement was undertaken Boca Grande Club filed a motion for summary judgment as to all of the claims filed in the limitation action. The motion was directed at the claims filed by the estates of Robert Polackwich and Jonathan Richards, as well as claims filed by relatives of the decedents, and the indemnity and contribution claims of Florida Power and the manufacturer of the sailboat. (R3-99). The motion was supported by a number of exhibits (R3-99, Exhibit Folder 2) and a legal memorandum. (R3-100). Because of the subsequent settlement and the entry of summary judgment as to the contribution claims it was not necessary for the district court to consider the motion. However, the motion for summary judgment was an

disguise the true nature and full extent of the culpability of Florida Power?[3]

The liability of Florida Power did not arise out of the settlement agreement between Boca Grande Club and the estates of the decedents.[4] The liability of Florida Power is based upon the fact of the violation by Florida Power of the permit which sanctioned the erection of an obstruction to navigation. The permit was issued by the United States Army Corps of Engineers; had the power line been erected in conformity with that permit there would have

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issue in the case before the Eleventh Circuit Court of Appeals but was not ruled upon. *Boca Grande Club, Inc. v. Polackwich*, 990 F.2d 606 (11th Cir. 1993). If this court affirms the court of appeals and remands this case, that motion is likely to be one of the first things to which the district court will give attention. The focus of the pending motion is on proximate cause. Boca Grande Club argues and demonstrates that the sole proximate cause for the collision was the low hanging power line erected by Florida Power.

[3] Throughout the limitation action Florida Power sought to fend off the state court actions by the estates of Polackwich and Richards by endeavoring to bring itself under the umbrella of the injunction entered in the limitation action. (Pet. App. A9; R2-55). Florida Power advised the state court that the injunction prohibited prosecution of decedents' claims against Florida Power in the state actions. (JA 42-43; R6-164, Exhibit A). To correct this subterfuge the joint motion asking for dismissal of the settled claims requested that the district court specifically state that the injunction protected only Boca Grande Club. (JA 38; 42-43; 49-50). Of course, the injunction never purported to protect any party other than Boca Grande Club, the owner of the sailboat and the petitioner in limitation.

[4] A total of eight separate claims were included in the settlement, two of which were with the representatives of the estates of Robert Polackwich and Jonathan Richards. (JA 64).

been more than sufficient clearance to permit Robert Polackwich and Jonathan Richards to sail safely beneath it. (See note 1, *supra*). Indeed, violation of the Corps of Engineers permit is negligence *per se*. If the issue of liability is ever tried in the limitation action, Florida Power will bear the burden imposed by *The Pennsylvania*, 86 U.S. 125, 22 L.Ed. 148 (1874); namely, to establish not only that its negligence did not contribute to the collision, but that its negligence *could not have contributed to the collision*. *American Zinc Company v. Foster*, 313 F.Supp. 671, 680-681 (S.D. Miss. 1970), *aff'd*, 441 F.2d 1100 (5th Cir. 1971), *cert. denied*, 404 U.S. 885, 92 S.Ct. 99, 30 L.Ed.2d 95 (1991); *Board of County Commissioners v. M/V Agelos Michel*, 390 F.Supp. 1012 (E.D. La. 1974). Should trial of the contribution claim ever become necessary Florida Power will be faced with a more fundamental problem; namely, the burden of establishing that the collision was caused or contributed to by the fault of Boca Grande Club. The proximate cause issue is the focus of the outstanding motion for summary judgment. As that motion demonstrates (R3-99 and 100) the sole proximate cause for the collision was the negligence of Florida Power in failing to keep its electric line at the height specified in the permit issued by the Corps of Engineers. As the motion points out, no act or omission on the part of Boca Grande Club caused or contributed to the failure of Florida Power to maintain its electric line at the permitted clearance above the water. Thus, proximate cause, an essential element of the Florida Power contribution claim, is lacking and cannot be established. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

RELIABLE DOES NOT RESTRICT ADOPTION OF A SETTLEMENT BAR RULE

The briefs of Respondent and the *amici* contain a great deal of rhetoric to the effect that *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975) prohibits this Court from establishing a settlement bar rule in maritime cases. They argue that the comparative fault principle laid down in *Reliable* will be abused if a settling defendant is permitted to avoid contribution claims. They raise the specter of a non-settling defendant paying more than its proportional share of the total liability and having no recourse to recover overpayment by means of contribution claims against settling defendants. Respondent asserts that *Reliable* mandates that litigation continue until the liability paid by each defendant has been fine tuned and adjusted to the nearest percentage point by the courts. Boca Grande Club urges that a settlement bar rule be adopted because it fosters settlement, conserves judicial resources and permits a plaintiff full or partial recompense without the risk and delay of trial. Neither the Respondent nor the *amici* have effectively blunted these considerations or convincingly shown that settlement, whether whole or partial, is not a dispute ending tool that the law should protect.[5]

This Court was the architect of the comparative fault principle laid down in *Reliable* and, of course, this Court

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[5] Applying the Florida Power theory logically means that *Reliable* will govern cases in which full and complete settlements have been achieved to insure that each defendant paid no more, or less, than its precise proportional part of the entire loss.

shall say how far the *Reliable* principle may be extended to the detriment of other equally deserving legal rules. For example, joint and several liability is a principle applicable in maritime law. Can it be denied that the *Reliable* concept of comparative fault is inconsistent with joint and several liability? If *Reliable* is to be applied to its logical limit then joint and several liability must fall. However, so far as Boca Grande Club is aware, the concept of joint and several liability is not presently under attack upon the basis that it conflicts with *Reliable*. Similarly, the fact that a settlement bar rule may impinge to some degree upon the unfettered application of the principle of comparative fault does not mean that this Court must inexorably strike down a settlement bar rule to protect *Reliable*.

A settlement bar rule and *Reliable* can comfortably coexist. *Rufolo v. Midwest Marine Contractor, Inc.*, 6 F.3d 448 (7th Cir. 1993); *Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989).

CONCLUSION

The judgment of the court of appeals should be reversed. This Court should adopt for application in this case and future maritime cases either a rule that makes claims for contribution by non-settling tortfeasors against settling tortfeasors unnecessary or a rule that will bar such claims.

Respectfully submitted,

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